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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 415

MARGARET HODGES,

Petitioner,

vs.

STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

STONEWALL DYER,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

Your petitioner was charged by accusation (R. 17) in the Criminal Court of Fulton County of the State of Georgia, same being a county court having jurisdiction of the subject matter, with the offense of keeping, employing, carrying on and maintaining a lottery, which is an offense in violation of the following state statute, Code of Georgia of 1933, §26-6502:

> "Any person who, by himself or another, shall keep, maintain, employ, or carry on any lottery or other

scheme or device for the hazarding of any money or valuable thing, shall be guilty of a misdemeanor."

Your petitioner was thereafter tried under said accusation and a verdict of guilty was returned by the jury (R. 4). In accordance with applicable provisions of state law, petitioner then filed her application and petition for certiorari to the Superior Court of Fulton County, Georgia (R. 6). In this petition error was assigned on various occurrences during the trial of the case. The assignment of error here insisted upon, and which movant contends was a denial of her rights to the due process of law, as hereinafter delineated, was assignment of error (n) (R. 15) as follows:

"n. Because the Court erred in admitting over objection accusation No. 181899:

"'* * * Mr. Zellers: We tender in evidence against this case of the State vs. Mrs. Claud Hodges for the purpose of showing state of mind, plan, scheme, design and similar transaction.' [Referring to tender of documentary evidence, same being Accusation No. 181899, Criminal Court of Fulton Co.]

'Mr. Hayes: I object to it as irrelevant, immaterial, highly prejudicial, too remote, being eight years ago, to illustrate her state of mind, and putting her character in issue when she has not done so.'

'The Court: I will admit accusation 181899, Criminal Court of Fulton Co. (Exhibit 14) * * *'."

Said Exhibit (R. 24) was an accusation charging your petitioner with the offense of maintaining a lottery on October 15, 1942, together with a plea of not guilty thereon and a verdict of guilty returned in said case. This evidence stood alone; there being in the record no evidence linking the offense of October 15, 1942 with the evidence in the instant case, and no attempt to show any similarity between

the two transactions, nor to link them together as showing any plan or scheme on the part of the defendant which related one to the other. The defendant had not put her character in issue.

The certiorari to the Superior Court of Fulton County was overruled by a judge of that court on June 28, 1951, the order overruling same being in part as follows (R. 151):

"In my opinion the rulings complained of in grounds 5(f), (h), (i), (l), (m), (n) and (o) do not require the grant of a new trial."

Your petitioner then brought to the Court of Appeals of Georgia, as provided by law a writ of error, assigning error on the order and judgment overruling the certiorari (R. 1). The Court of Appeals thereafter, on February 27, 1952, affirmed the judgment of the Superior Court of Fulton County, four judges concurring and two dissenting. In deciding the case the court considered and rejected the assignment of error (n) as shown by the following excerpt from the opinion (R. 156): "The State introduced accusations charging the defendant with playing the lottery number game in 1941 and 1942, upon each of which there was a verdict of guilty." The minority opinion, containing an analysis of over a hundred cases dealing with the admissibility of evidence as to other criminal transactions, vigorously dissented (R. 158). A motion to rehear was made and denied by the Court of Appeals of Georgia on March 13, 1952 (R. 164). Thereafter a writ of certiorari was sought in the Supreme Court (R. 174) and granted (R. 239). But on July 14, 1952, said writ was dismissed as having been improvidently granted (R. 186) and the petition for rehearing (R. 188), pointing out that the decision of the Court of Appeals affirming the conviction and the decision of the Supreme Court refusing to allow petitioner to amend what

the court pointed out as a purely technical defect in the petition for writ of certiorari was in violation of her right to the due process of law under the Fourteenth Amendment to the Constitution of the United States, was denied on July 28, 1952 (R. 198). This action made the decision and opinion of the Court of Appeals absolutely final so far as the Courts of Georgia are concerned.

Jurisdictional Statement

This court has jurisdiction of the matter because:

(a) It is within the purview of Title 28, U.S.C.A., Section 1257, subsection (3), as being a case wherein is involved a final judgment rendered by the highest court of the State of Georgia in which a decision could be had on the subject matter of which review is sought by the writ of certiorari, where there is specially set up and claimed a right under the Constitution of the United States.

(b) The questions involved are substantial, in that your petitioner was convicted and sentenced, and, unless the writ of certiorari is granted by this Court, will have to serve a sentence of imprisonment as the result of a verdict based upon illegal evidence of so serious a nature that it amounts to a deprivation of petitioner's Constitution right to due process of law.

Question Presented

(1) Did the admission in evidence on the trial of this case of matter which the judicial decisions of the United States, as well as the State of Georgia, recognize as being irrelevant and immaterial, and as placing the defendant's character in issue, and as constituting prejudicial error requiring reversal, deny to the defendant a fair trial in such manner as to work a deprivation of her liberty without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States?

(2) Was the action of the Supreme Court of the State of Georgia, in dismissing the petition for certiorari after having granted same, for the purely technical reasons set out in its opinion (R. 186), in the face of express authority extended it under Section I, Article VI, Paragraph IV of the Constitution of Georgia to allow the proffered amendment correcting the technical defects pointed out, of such a quality as to violate that fundamental fairness essential to the very concept of justice and thereby work a deprivation of petitioner's liberty without due process of law?

Specification of Assigned Errors

Petitioner says that the Court of Appeals of Georgia erred (1) in affirming the judgment of the trial court convicting petitioner of the offense charged, in part at least, on incompetent evidence flagrantly prejudicial to petitioner and which denied her the fundamentals of a fair trial, and (2) in holding that the allowance by the trial court of the record of a previous conviction in no way related to the case at bar was not error.

Petitioner further says that the Supreme Court of Georgia abused its discretion in dismissing petitioner's application for writ of certiorari after having granted the same, on purely formal grounds, and refusing to reinstate the same after petitioner tendered an amendment correcting the alleged defects therein.

Reasons Relied On for Allowance of the Writ

The writ of certiorari from this Court to the Court of Appeals and Supreme Court of Georgia should be granted and the decision complained of should be reviewed and reversed on the grounds that:

1. Petitioner was convicted in a case where evidence was admitted over objection which was incompetent and preju-

dicial in its nature to the extent that it denied her that fundamental fairness in the conduct of judicial proceedings essential to the very concept of justice, and worked a deprivation of her liberty without due process of law. *Lisenba* v. *California*, 314 U. S. 219 (7); *Boyd* v. *U. S.*, 142 U. S. 450; *Bacon* v. *State*, 209 Ga. 261, 71 S. E. 2nd 615.

2. Petitioner's position and her concept of the rules of law applicable to her case were substantiated, and the judgment of the Court of Appeals *in this case* was held to be erroneous by the Supreme Court of Georgia in *Bacon* v. *State supra*, by express mention therein of this case, all of which conclusively demonstrates that your petitioner's conviction is illegal. This being so, the dismissal of the petition for certiorari by the Supreme Court of Georgia and its refusal to allow an amendment, when empowered by the Constitution of Georgia so to do, was an abuse of discretion, and this case should, at the very least, be remanded to the Supreme Court of Georgia for a ruling on the question of whether the petitioner's claim may be determined under the state Constitution or whether petitioner is without appropriate remedy. *Jennings* v. *Illinois*, 342 U. S. 104, 97 L. Ed. 105.

And now, within the time provided by law and within ninety days of the date of the final order in the matter, to-wit: the judgment of the Supreme Court of Georgia (R. 198) rendered on July 28, 1952, which denied a rehearing of the judgment of that court dismissing the petition for certiorari to review the decision of the Court of Appeals of Georgia of which complaint is made.

Petitioner prays that a writ of certiorari issue under the seal of this Court to the Court of Appeals of Georgia and the Supreme Court of Georgia, commanding said courts to send to this Court a full and complete transcript of the proceedings of the said courts had in the cause num-

bered and entitled as follows: In the Court of Appeals of Georgia, No. 33758. Margaret Hodges v. State; In the Supreme Court of Georgia, No. 17879. Margaret Hodges v. State to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgments therein be reversed by this Court, and for such further relief as to this Court may seem proper.

MARGARET HODGES,
Petitioner;
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SUPREME COURT OF THE UNITED STATES

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STATE OF GEORGIA

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS AND SUPREME COURT OF GEORGIA.

Official Report of the Opinion of the Court Below

The official report of the opinions of the courts of which review is sought is:

Hodges v. *State*, 85 Ga. App. 617, 70 S.E. 2nd 48;
Hodges v. *State*, 71 S.E. 2nd 543, 209 Ga. 283.

Grounds of Jurisdiction

This Court has jurisdiction of this case under the provisions of Section 1257(3), Title 28, U.S.C.A. as one involving a final judgment of the highest court in a state in which a decision could be had, of which review by certiorari is sought, and wherein is set up and claimed a right,

privilege and immunity under the Fourteenth Amendment of the Constitution of the United States.

Statement of the Case

Under the heading "Summary Statement of the Matter Involved" in the foregoing attached petition for certiorari, a statement of the case sufficient to a clear understanding of the case is made and is here adopted as a part of this brief.

Specification of the Errors Urged

The Court of Appeals of Georgia erred in its judgment in this case in affirming a judgment of the Superior Court of Fulton County dismissing a petition for certiorari from the Criminal Court of Fulton County for the correction of errors in the latter court resulting in the conviction of this defendant of the offense of maintaining a lottery known as the numbers game. The appeal is specifically from this judgment, under the authority of *Chesapeake and Ohio Ry. Co.* v. *Kuhn,* 284 U. S. 44. Error is further assigned, however, on the action of the Supreme Court of Georgia, because, admitting that the original grant of a petition for certiorari is entirely a matter for that court, it is nevertheless contended that where, after the writ was granted in that court, it was thereafter dismissed because of purely formal reasons—to-wit, that the petition for certiorari contained matter of argument—petitioner offered an amendment striking all matter deemed by the court to be irrelevant and otherwise meeting all requirements of Supreme Court rules, and this amendment was refused and the court refused to consider the petition, although under the power of the Constitution of Georgia it had authority to do so, that such action was an abuse of the court's discretion and resulted in a denial of due process of law to the defendant.

The Argument

The judgment of the Court of Appeals affirming this conviction is properly before this Court under the decision of *Chesapeake and Ohio Ry.* v. *Kuhn, supra* to the effect that the writ of certiorari properly is directed to the intermediate court where the court of last resort, in this case the Supreme Court of Georgia, has a discretion as to whether it may desire to review such decision or not, and where it exercises its discretion by declining to review the cause. The judgment of the Supreme Court here dismissing the writ as having been improvidently granted had such effect. And, although realizing as appellant does that ordinarily the Supreme Court of the United States will not interfere with purely procedural matters in the courts of the States, and that for this reason the second assignment of error, to the effect that the Supreme Court of Georgia abused its discretion in failing to allow the amendment contained in the motion to rehear in that court (R. 193) and refused to reconsider its judgment of dismissal, might ordinarily be without merit, nevertheless in this case this action affirmatively shows that the petitioner was denied her right to a fair and legal trial, in violation of the Fourteenth Amendment, for the following reasons:

At the January, 1951 term of court the Court of Appeals had before it for review this decision and the case of *Bacon* v. *State,* 85 Ga. App. 630, 70 S.E. 2nd 54, both cases involving the question of whether, under the laws of Georgia and the Constitution of the United States, a legal conviction could rest, in part at least, upon proof of a crime of exactly the same sort, committed from one to eight years prior thereto, where the evidence introduced was simply an accusation or indictment with plea of "not guilty" thereon, and a conviction, no effort being made to link the crimes together as part of any plan or scheme, and

the defendant not having put his character in issue. These cases were decided by the Court of Appeals on the same day—February 27, 1952. In both cases four judges of the court affirmed the decision, two dissented. In both cases the dissent was based upon the proposition that such evidence was illegal and prejudicial, and resulted in the defendant being deprived of a fair and impartial trial. Both cases were then taken to the Supreme Court of Georgia by writ of certiorari, and on the same day, July 14, 1952, judgments were rendered in each.

In the case of *Bacon* v. *State*, which is the latest expression of opinion by the Supreme Court of this State on the subject, it was held that the statute law of this State upon this subject was as follows:

> "Code of Ga. of 1933, § 38-202. The general character of the parties, and especially their conduct in other transactions, are irrelevant matter, unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct."

The Supreme Court then stated as follows: "The rule referred to is still in the Code (§ 38-202), and the appellate courts are without power to repeal it or destroy it by chiseling it away, which would be the result if the present decision of the Court of Appeals should stand. The second division of the opinion and judgment of affirmance by the majority of the Court of Appeals as rendered is not only in conflict with the decisions of this Court hereinbefore cited and referred to, but also in conflict with its own decisions." This same decision referred approvingly to the dissenting opinion in *Hodges* v. *State*, which is the case now before this Court. Thus, the Supreme Court of Georgia held that the introduction of prior convictions with pleas of *not guilty* thereon, without more, was such as to deprive a defendant of a fair trial, and that the appellate courts of

the State of George were without power to affirm a conviction so obtained, and in so doing it referred specifically to the case at bar. Nevertheless, although it had *previously* granted the writ of certiorari in this case and the case was still pending before it, it refused to consider an amendment to the petition for certiorari in that case although specifically empowered to do so under Sec. I, Article VI, Par. IV, (Code §2-3704) of the Constitution of Georgia, providing that the Supreme Court shall have the same power and authority for the review and determination of cases brought to that court by certiorari from the Georgia Court of Appeals as if they were brought by writ of error, and under Code of Ga. § 6-1309, providing that no writ of error shall be dismissed in the appellate court when by amendment to the bill of exceptions any imperfection or omission of necessary and proper allegations could be corrected from the record in the case. Petitioner moved to amend by re-phrasing certain sentences indicated to be defective (see *Hodges* v. *State*, 209 Ga. 283, 71 S.E. 2nd 543, and motion to rehear, R. 193), and petitioner contends that the Supreme Court, *having already granted the writ and assumed jurisdiction of the case*, and, having, on the same day, decided that the appellate courts *are without power* to alter the statute by a judicial application which would permit a conviction based on the introduction of previous convictions of crime, without more, and having further stated that such action is in conflict with "a fundamental principle of our system of jurisprudence, intended to protect the individual who is charged with crime, and in insure him a fair and impartial trial" (*Bacon* v. *State*, 209 Ga. at 262) the Supreme Court denied this defendant her right to a fair and impartial trial, by its own statement, and that such action was so drastic, and so utterly without precedent in the history of Georgia courts, as to be a denial of her

right to due process of law. *Jennings* v. *Ill.*, 342 U.S. 104, 96 L. Ed. 105

II. Due Process: Its Meaning as Applied to This Case

This Court has frequently held that where a trial is infected with illegal evidence which prevents the very semblance of a fair and impartial hearing, the judgment will be set aside, no matter how free of taint the other evidence may be. This rule has been most frequently applied in cases involving the reception in evidence of a confession involuntarily made and illegally obtained. See *Malinski* v. *New York*, 324 U.S. 401, 89 L. Ed. 1029, 65 S. Ct. 781; *Ashcraft* v. *Tenn.*, 322 U.S. 143; *Lyons* v. *Oklahoma*, 322 U.S. 596; *Gallegos* v. *Neb.*, 342 U.S. 55; 96 L. Ed. 82; *Jennings* v. *Illinois*, *supra*. It is not, however, limited to such cases, but applies to any case where there is such a fundamental unfairness in the admission of evidence, whether true or false, as to "work a deprivation of the prisoner's life or liberty without due process of law." *Lisenba* v. *California*, 314 U.S. 219 at page 236. While the States are free to adopt the rules of their choice as to the admissibility or exclusion of evidence, the adoption of such rule "cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law" and "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Id.*

It follows, therefore, that if it may properly be said that the introduction in the case of certified copies of records of previous convictions eight years previously, not connected in any way with the case on trial, was a failure to observe that fundamental fairness essential to the very concept of justice, that its introduction in this case must be a denial of due process. Yet both the Supreme Court of

Georgia and the Supreme Court of the United States are on record as deciding that this is exactly what such evidence shows, and is the necessary result of its use. In *Boyd* v. *U. S.*, 142 U. S. 450, 35 L. Ed. 1077, 12 S. C. 292, it was held that proof of previous criminal offenses not connected with the case on trial "only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime . . . However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidnce, and only for the offence charged." This decision was followed in *Hall* v. *U. S.*, 150 U.S. 80, 37 L. Ed. 1066, where it was held that the argument based upon proof of *acquittal* of a former crime of the same sort "gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury." This rule was again recognized in *Johnson* v. *U. S.*, 318 U.S. 189, 87 L. Ed. 711, 63 S. C. 552. This Court has never deviated from its decision that such evidence, whether true or false, so taints the trial with fundamental unfairness to the rights of the defendant by injecting his character into the trial without his consent that a verdict based in part or wholly thereon will not be allowed to stand.

Is there any variance between the Federal rule and the rule in Georgia as to such evidence, either statutory or of judicial creation, by which it might be said that Georgia, as a sovereign State, would have the right to insist upon a different rule? The question is conclusively answered in *Bacon* v. *State*, *supra*. The statutory law of Georgia, em-

bodied in § 38-202, is to the same effect. And in the *Bacon* case, decided the same day as this case, it was held that the Appellate Courts of Georgia were without power to repeal it or destroy it by chiseling it away. The points on which the cases turn is identical—the admission of the certified copy of the previous conviction of a crime of the same sort. In the *Bacon* case the convictions admitted were within a year or two of the case for which Bacon was on trial. In the *Hodges* case the convictions were for crimes seven and eight years, respectively, prior to the case for which petitioner was on trial. The Supreme Court of Georgia in the *Bacon* case referred to this right as a "fundamental principle in our system of jurisprudence". (71 S.E. 2nd p. 616.) This fundamental principle was denied to petitioner. There is a little difference in wording between the characterization given by the Supreme Court of Georgia as to this act being a violation of the fundamental principles of our system of jurisprudence and the characterization given by this Court in *Lisenba* v. *California, supra* of a violation of due process of law which "as applied in a criminal trial . . . [is] failure to observe that fundamental fairness essential to the very concept of justice." Both courts recognize this rule of law to be "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319. And this Court, while it will not inquire into the adoption by the state of a rule of her choice, will examine the application of that rule to see if it works a deprivation of life or liberty, and to do this it will re-examine the entire record in the case. *Lisenba* v. *California, supra; Palakiko* v. *Territory of Hawaii*, 188 Fed. 2nd, 54. There was also illegal evidence in the case at bar relating to the previous *acquittal* of this defendant several years previously, and the illegal introduction of evidence secured by the police on a raid of certain premises

which was used upon that trial. The record shows, as the dissenting opinion in this case in the Court of Appeals pointed out, the purposeful injection into the case of three previous transactions which had nothing whatever to do with the case on trial, for the sole purpose of showing that the defendant had a "criminal bent of mind", all of which necessarily placed her character in issue. The record in this case and contemporaneous opinions of the Supreme Court of Georgia, of which this Court will take notice, conclusively evince that a State statute was misapplied, in contravention of the fundamental principles of justice, of the judicial law of the State of Georgia, the judicial law of the United States, and in contravention of the Fourteenth Amendment to the Constitution of the United States. And, while this Court will not ordinarily take notice of mere procedural activities of State courts, it will do so when the result is a violation of a Federal right under Federal statute or the Federal Constitution. *Brown* v. *Western Ry. of Alabama,* 338 U.S. 294, reversing 77 Ga. App. 780.

Conclusion

Counsel for petitioner submits that there is here presented a proper case for review by certiorari by this Court of the judgments and opinions of the Court of Appeals and Supreme Court of Georgia under the jurisdictional provisions of Title 28, U.S.C.A., Sec. 1257(3) and under the reasons for allowance of the writ of certiorari contained in Rule 38, Subsection 5(a) of this Court.

Not only is a Federal question of substance and importance involved in a claim of right, privilege and immunity under the Constitution of the United States (*U. S.* v. *Sutherland,* 37 Fed. Supp. 344) but the action of the Supreme Court of Georgia, in refusing to decide petitioner's case, after taking jurisdiction thereof, amounted to

the withholding from petitioner of redress admittedly due her, and was in itself a second denial of due process of law.

It is respectfully submitted that this Court should:

(1) Reverse the judgment and opinion of the Court of Appeals of Georgia, or

(2) In the alternative, remand the case to the Supreme Court of Georgia for a decision upon the merits.

Respectfully submitted,

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